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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 422

SERVICE TRUCKING COMPANY, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, Service Trucking Co., Inc., submits its statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

OPINION BELOW

(a) The opinion of the United States District Court, which is not yet officially reported, is set forth in full in Appendix "A" to this Statement. The Report and Order of the Interstate Commerce Commission, issued in Service Trucking Co., Inc., Petition for Declaratory Order, is reported at 94 M.C.C. 222, and is set forth in full in Appendix "B".

JURISDICTION

(b) (i) Appellant, Service Trucking Co., Inc., instituted suit before the United States District Court for the District of Maryland on January 31, 1964, under the provisions of Sections 1336, 1398 and 2321 through 2325 of the Code, inclusive, and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.

This appeal seeks review of the action of the District Court sustaining the holding of the Interstate Commerce Commission that appellant's certificate of public convenience and necessity does not permit operations between points in Maryland over routes through the State of Delaware.

(ii) The judgment of the District Court was entered on April 22, 1965, and is reproduced herein as Appendix "C". The District Court denied appellant's motion for rehearing by order entered April 30, 1965, and that order is reproduced herein as Appendix "D". Notice of Appeal was filed in the District Court on May 19, 1965.

(iii) The jurisdiction of this Court is invoked under the provisions of Sections 1253 and 2101(b) of Title 28, U.S. Code.

(iv) The jurisdiction of this Court is believed to be sustained by a number of decisions of this Court, including:

U.S. v. Baltimore and Ohio R. Co., 333 U.S. 169;

U.S. v. Hancock Truck Lines, 324 U.S. 774;

Radio Corporation of America v. U.S., 341 U.S. 412;

American Trucking Ass'n. Inc. v. U.S., 344 U.S. 298;

United States v. Seatrain Lines, Inc., 329 U.S. 424.

STATUTES INVOLVED

The essential issues decided by the Interstate Commerce Commission and by the lower court in the proceedings giving rise to this appeal require construction and application of several sections of Part II of the Interstate Commerce Act and certain provisions of the Administrative Procedure Act. The statutory provisions involved are set forth below:

(a) Interstate Commerce Act

Section 203(a)(10) (49 U.S.C. § 306(a)(10)):

> "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water . . .

Section 206(a) (49 U.S.C. § 306(a)):

> "(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since

that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of the section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. . . ."

Section 207(a) (49 U.S.C. § 307(a)):

"Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . ."

Section 208(a) (49 U.S.C. § 308(a)):

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is

authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Section 204(a)(1) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Section 212(a) (49 U.S.C. § 312(a)):

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any terms, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days,

to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder. . . ."

(b) Administrative Procedure Act

Section 10 (5 U.S.C., Sec. 1009):

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * * * * * * *

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record of such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

QUESTIONS PRESENTED

(a) Whether the Interstate Commerce Commission may place an interpretation on a certificate of public convenience and necessity contrary to the literal terms of said certificate.

(b) Whether the Interstate Commerce Commission may impose a requirement of continuing economic justification on a federally-certificated motor carrier's operations where neither the certificate nor the statute under which it was issued impose such a requirement.

(c) Whether the imposition by the Commission of a requirement of economic justification on an interstate motor carrier's operations between points in the same state over an interstate routing which has the effect of reducing the scope and the volume of the carrier's services constitutes partial revocation in an unauthorized manner in violation of Section 212(a) of Part II of the Interstate Commerce Act.

(d) Whether the Commission's use of the interpretative standard "bona fides" in the construction of a certificate is sufficiently certain to satisfy the provisions of Section 208(a) requiring "specification" of the service, routes, termini and territories to be served by motor carriers under interstate certificates.

(e) Whether the Commission's action in the instant proceeding constitutes unauthorized administrative amendment to the definition of interstate commerce set forth in Section 203(a)(10) of Part II of the Interstate Commerce Act.

(f) Whether the District Court erred in failing to make findings of fact and conclusions of law (as required by Rule 52(a) of the Federal Rules of Civil Procedure) with respect to whether the Commission's

interpretation of appellant's certificate impliedly amended said certificate in contravention of Section 212(a).

(g) Whether the District Court abused its discretion in denying appellant's Motion for Re-hearing, which included a prayer, that the Court "amend and supplement its opinion with an expression on the issue of whether appellant's certificate of public convenience and necessity literally authorizes the operations in question."

STATEMENT OF THE CASE

(a) Identification of Appellant

Service Trucking Company, Inc. is a Maryland corporation, having its general offices at Federalsburg, Maryland. It holds a certificate of public convenience and necessity issued by the Interstate Commerce Commission in Docket No. MC-75185 and subs thereunder authorizing the transportation of property by motor vehicle in interstate commerce.

For many years prior to its incorporation in March of 1943, the business conducted by Service as a motor common carrier had been conducted as an individual proprietorship. In March, 1943, Service filed with the Interstate Commerce Commission an application under the provisions of Section 207(a) of Part II of the Interstate Commerce Act. At the time of that filing, Service was conducting certain interstate motor carrier operations under temporary authority issued by the Interstate Commerce Commission, and other operations were being performed under color of "grandfather rights", which had been applied for under the provisions of Section 206(a) of Part II of the Interstate Commerce Act. In the March, 1943, filing,

Service requested from the Commission authority to transport general commodities (with certain exceptions) between (among other areas) those portions of Delaware, Maryland and Virginia, south of the Chesapeake and Delaware Canal and east of the Chesapeake Bay familiarly called the Delmarva Peninsula, on the one hand, and, on the other, points in Southern New England and Middle Atlantic States, including Maryland. Extended proceedings, including a further hearing, were conducted before the Interstate Commerce Commission. Ultimately, the application was granted in part and denied in part; as evidenced by the Commission's report and order in *Service Trucking Company, Inc., Extension of Operations—Eastern Shore,* 46 M.C.C. 465.

(b) The Certificate Involved

Under appellant's certificate of public convenience and necessity, as evidenced by Exhibit 1 introduced before the Commission, Service Trucking Company, Inc. now holds voluminous grants of authority. However, for purposes of decision here, the court need only consider that portion of the certificate which reads as follows:

> "After Due Investigation, it appearing that the above-named carrier . . . is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier—
>
> "It Is Ordered, That the said carrier be, and it is hereby, granted a certificate of public convenience and necessity as evidence of the authority of the holder to engage in the transportation of interstate and foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions and limitations as are now, or may here-

after be attached to the exercise of the privileges herein granted to the said carrier.

"IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

"Irregular routes:

"1. Agricultural commodities, live and dressed poultry, canned goods, preserved foods, forest products, seafood, and empty containers as follows:

"From points and places in Delaware, Maryland and Virginia, east of Chesapeake Bay and south of the Chesapeake and Delaware Canal to Norfolk, Portsmouth and Richmond, Virginia, points and places in New Jersey, the District of Columbia and Points and places in Maryland on and east of U.S. Highway 15 . . .

"2. General commodities, etc., as follows:

"From points and places in the above-described destination territory to points and places in Delaware, Maryland and Virginia, east of Chesapeake and Delaware Canal."

The certificate also contains the following condition:

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

(c) Summary of Commission and District Court Proceedings

Kent Freight Lines, Preston Trucking Company and Victor Lynn Lines, on September 14, 1961, instituted proceedings before the Public Service Commission of Maryland contending, *inter alia,* that Service Trucking Company, Inc., was conducting operations in the transportation of property for compensation between points in Maryland in the absence of holding a certificate from Maryland authorities. Service Trucking Company on October 17, 1961, filed a petition with the Interstate Commerce Commission under Section 5(d) of the Administrative Procedure Act for a declaratory order or alternatively for an order interpreting its Interstate Commerce Commission certificate of public convenience and necessity and requested a finding by the Interstate Commerce Commission that the operations complained of by the intervening defendants here were authorized under its federal certificate. After the filing by appellant of its petition for declaratory order with the Interstate Commerce Commission, the Maryland Public Service Commission stayed action on the Complaint there pending until final decision by the Interstate Commerce Commission and that matter continues in abeyance.

Following appropriate notice in the Federal Register, hearings on the petition by the Interstate Commerce Commission were conducted at which the complaining Maryland carriers were permitted to participate. The Hearing Examiner recommended denial of appellant's petition holding that the questioned operations "having both origin and destination at points in Maryland through Delaware are for the purpose of evading the lawful regulations of Maryland . . ." Thereafter exceptions to the recommendations of the

Examiner were filed with the Interstate Commerce Commission to which opposing carriers replied. By order dated December 17, 1963, the Interstate Commerce Commission by Division 1 (one of three members dissenting) in substance adopted the recommendations of the Examiner and denied appellant's petition holding that, *inter alia,* "petitioner by engaging in the considered transportation is attempting in bad faith to convert interstate movements traffic which, but for its routing, is actually in intra-state commerce subject to the laws of Maryland." Action in the District Court was instituted on January 30, 1964, and enforcement of the Commission's order was enjoined by the issuance of a temporary restraining order on February 18, 1964.

By opinion filed April 2, 1965 (Appendix A), the District Court sustained the Commission's action without expression as to whether appellant's certificate "on its face" authorized the questioned operations. Appellant thereafter on April 23, 1965, filed its Motion for Rehearing with the District Court. In its Motion for Rehearing appellant, *inter alia,* specifically requested the lower Court to express itself on "the issue of whether plaintiff's certificate of public convenience and necessity literally authorizes the operations in question." The Motion was denied by order dated April 30, 1965. On May 10, 1965, the District Court upon appellant's request and after argument enjoined enforcement of the Commission's order pending appeal to this Court.

(d) The Questioned Operations

The Commission's Report and Order hereto attached as Appendix "B" satisfactorily makes findings as to the nature of, and the method followed by appellant in providing, services under its certificate. Accordingly, the Commission's description of the physical operations of appellant is accepted and is quoted verbatim:

> "Petitioner, for many years, has been transporting freight between points in Maryland, Delaware, and Virginia on the Delmarva Peninsula and points in the other areas it is authorized to serve. It maintains terminals, as here pertinent, at Baltimore and Federalsburg, and all shipments from the Baltimore area, and from points south and west thereof, move to points on the Delmarva Peninsula through its Baltimore and Federalsburg terminals. Initially, petitioner was primarily a carrier of freight, in truckloads, or volume quantities, for which no operating franchise was required in Maryland on intrastate traffic, but beginning some time after 1955, petitioner increased the handling of less-than-truckload shipments, and a large portion of its activity is now in this phase of transportation. Some of this traffic consists of shipments from one Maryland point to another, principally from the Baltimore area to points on Maryland's Eastern Shore, and such shipments are combined at the Baltimore terminal with less-than-truckload shipments from points beyond Maryland. The consolidated shipments are then transported in motor vehicles over routes in Maryland to the Delaware-Maryland boundary line, thence over Delaware Highway 404 to Bridgeville, thence over Delaware and Maryland State highways to Federalsburg, hereinafter called the Bridgeville route. There the individual shipments are distributed by 'peddle operations' to their ultimate destinations on the Delmarva Peninsula. On shipments from points on the

peninsula the procedure is reversed. Use of the Bridgeville route results in a circuitous between-terminals operation of approximately 12 miles when compared with the direct Maryland routes between the Chesapeake Bay Bridge and Federalsburg."

(94 M.C.C. at 224-25)

(e) The Affirmative Evidence of Appellant's Good Faith

Despite the fact that the Hearing Examiner and the Commission and the District Court were requested to make specific findings with respect to the issue of good faith, most if not all of the affirmative evidence of appellant's good faith was ignored. As a consequence, it is necessary here to summarize those fact findings clearly manifested by the evidence and other record materials and which must necessarily be considered if the issue of good faith is found by the court to be relevant.

(i) Vehicles employed by appellant in providing the questioned transportation services do, as a matter of fact, move between Maryland points via Bridgeville, Delaware, and there is no evidence to demonstrate that any shipments transported between Maryland points (which would be subject to economic or franchise regulation by Maryland authorities) move wholly over Maryland highways. (R. 50, 117)[1]

(ii) Federalsburg, Maryland, is located in the geographic center of the area known as the Delmarva Peninsula, and is now and has been for many years the

[1] R. —— indicates references to transcript of testimony before Interstate Commerce Commission; Exh. —— indicates reference to Exhibits received in evidence.

site of appellant's general office and largest terminal. (R. 24-25)

(iii) The Delmarva Peninsula, although made up of portions of the States of Delaware, Maryland, and Virginia, is a geographic unit being wholly surrounded by water (Exh. 2).[1] Federalsburg, being in the geographic center of the Delmarva Peninsula, is a natural distribution point for motor carriers serving that territory and appellant has not established additional terminals at Bridgeville, Delaware, or elsewhere for reasons of economy and efficiency. (R. 26)

(iv) All traffic handled by appellant in the questioned operations moved subject to interstate rates contained in tariffs filed with the Interstate Commerce Commission (R. 27) and was receipted for by uniform straight bills of lading.

(v) All traffic handled by appellant in the questioned operations moved subject to rates as high as or higher than other carriers serving the territory, whether as intra-state or interstate operators. (Exh. 3)

(vi) (a) Patrons of appellant's services between Maryland points through Delaware are aware that the route of movement is interstate (R. 28-31) and that the highways followed by plaintiff through Delaware are longer than the shortest available routes. (b) Appellant solicits the traffic involved to move as interstate traffic only. (R. 28-33, 118, Exh. 10)

(vii) Competitive carriers including intervening defendants in this proceeding in performing operations between points in Maryland, whether over interstate routings or intra-state routings, route such shipments over longer routes than the shortest routes available (R. 174) and such circuitous operations in the han-

dling of less-truckload traffic is common to all carriers. (R. 176, R. 190)

(viii) In demonstrated good faith, long prior to complaint by competitors, appellant sought and obtained an informal opinion from the Director of the Interstate Commerce Commission's Bureau of Motor Carriers that the operations in question were authorized under appellant's certificate. (Appendices to Petition for Declaratory Order)

THE QUESTIONS ARE SUBSTANTIAL

Resolution of the issues raised in this proceeding are not alone important to appellant and the other private litigants. The decision of the District Court and the Commission if allowed to stand will have significant and far reaching effect in the future administration of Part II of the Interstate Commerce Act because those decisions reverse (not expressly but by necessary implication) settled administrative and judicial interpretation of the Federal Motor Carrier Act and fail to give effect to decisions of this Court concerning the nature, meaning, scope and non-revocability of certificates of public convenience and necessity issued by the Interstate Commerce Commission.

I. Certificates of Public Convenience and Necessity If Unambiguous, Must Be Interpreted In Accordance With the Literal Terms Thereof

Because of the nature of the proceedings before the Virginia State Corporation Commission in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia,* 199 Va. 797, this Court found it desirable to express itself fully on the two principal issues raised on review in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia,* 359 U.S. 171. There, the

petitioner, the holder of a certificate of public convenience and necessity from the Interstate Commerce Commission, had contended that its operations from Virginia points to Virginia points through Bluefield, West Virginia were (a) authorized by the literal terms of its certificate and that (b) the "bona fides" of the certificated operations could not be called into question by state authorities. This Court there reversed the Virginia Court of Appeals which had sustained the Virginia State Corporation Commission's holding that the questioned operations even if interstate in character constituted a subterfuge to avoid state regulation. In reversing this Court observed, *inter alia,* "Its [petitioner's] activity is carried on under a certificate of convenience and necessity issued by the Interstate Commerce Commission", 359 U.S. 173, and later stated, "The certificate on its face covers the whole operation." 359 U.S. 177

Although this Court also rejected Virginia contention that Petitioner's operations were not "bona fide", decision on that issue was not essential to disposition of the case. Unfortunately, however, the Interstate Commerce Commission interprets *Service Storage, supra,* as permitting it (the Commission) to continue to re-examine operations of a certificated carrier to determine whether they have economic justification without regard to the literal terms of the certificate. In other words, there now has been engrafted on certificates a continuing *sound business purpose* requirement when interstate operations are conducted between points in the same state. That necessary consequence occurs irrespective of whether there was presented evidence of a requirement of *sound business purpose* at the time of certification sufficient to require the im-

position of a restriction in the authority initially granted. The adoption of that novel and vague standard has no statutory or other support and not only leads to a rejection of the long-standing and consistently applied principle that certificates of convenience and necessity "must be construed according to their terms", but also establishes that the Commission is not, in this case, interpreting the certificate but is, in fact, amending it in contravention of Section 212(a) of the Interstate Commerce Act.

The necessary point of beginning towards resolution of the ultimate issue presented in this proceeding is whether the terms of appellant's certificate literally construed authorize the questioned operations. Before the District Court (as well as before the Commission) appellant urged the proposition that the literal terms of the certificate permitted the operations. The Interstate Commerce Commission chose not to respond. Intervening defendants before the court below however stated on brief:

> "* * * We now and at all times wholeheartedly agree this certificate literally authorizes interstate operations between Eastern Shore points in Maryland and the Baltimore area."

With the concession that the literal terms of appellant's certificate authorized the operations in question, the rule of decision expressed in *C & E Trucking Corp.*, 88 M.C.C. 391, must be applied. There the Commission stated at page 393, that except where patently indefinite or ambiguous,

> "operating rights must be construed according to their terms regardless of what may have been intended at the time of their issuance."

During the course of oral argument and on Motion for Rehearing the more thoroughly reasoned opinion contained in *Coastal Tank Lines, Inc., et al* v. *Charlton Bros. Transportation Company, Inc.,* 48 M.C.C. 289, was cited to the District Court. In that case the Commission held that a certificate containing the term description "general commodities" without restrictions means all types of commodities and includes the right to transport petroleum products in bulk in tank trucks. Complainants there urged the Commission to find that the unrestricted general commodity authority had been issued through a mistake of fact and they sought to have the certificate modified so as to prohibit the transportation of petroleum products, in bulk, in tank trucks. In refusing to do so, the Commission stated, page 299:

> "There is no ambiguity in the language of defendant's certificate here. The only question here is whether the defendant is conducting unauthorized operations. The answer to that question must be found in the language contained in the certificate."

Later the Commission observed, page 300:

> "* * * It is clear that in this proceeding the sole criterion, as to whether the defendant is conducting unauthorized operations is the terms of the certificate."

With continuing emphasis, the Commission stated at page 301:

> "Here there is no ambiguity in the terms of the defendant's certificate, to the extent in question, and only the terms of the certificate may be looked to in determining its operating rights."

Concluding the Commission stated, page 302:

> "While it may be that when the certificate was originally issued to the defendant, petroleum products, in bulk, in tank trucks, should have been excepted from the grant of authority, they were not, and we may not now by interpretation, so modify the certificate. Such action in the circumstances here disclosed would amount to a partial revocation of the defendant's certificate without benefit to it of the procedure provided in Section 212(a) of the Act. Compare Tidewater Transfer Co., Inc., Extension—Wines in Bulk, 47 M.C.C. 496."

If as appellant contends and this Court finds that that portion of the certificate in question is unambiguous and literally authorized operations between the Maryland territories involved, the doctrine of *Coastal, supra,* would appear to control.

In application of the Coastal rule of decision, consideration also should be given to *U.S.* v. *Seatrain,* 329 U.S. 424, and *U.S.* v. *Watson Bros. Transportation Company,* 350 U.S. 927, cited with approval in *American Trucking Associations* v. *Frisco Transportation Co.,* 358 U.S. 133.

In the last cited case, this Court reversed the U. S. District Court which had sustained a Commission order refusing to impose restrictions on a railroad's motor carrier certificate which had been mistakenly or inadvertently omitted by the Commission. In short, the Commission's inadvertent error was ordered to be corrected. But as a caveat this Court stated, 358 U.S. 145-146:

> "It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake. * * *

> "Of course, the power to correct inadvertent ministerial errors *may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.* Such was the case in United States v. Seatrain Lines, Inc., 329 U.S. 424. * * *"
>
> "To allow the reopening of proceedings in such a case under the pretext of correction would undercut the obvious purpose of Section 212 of the Interstate Commerce Act which makes the issuance of a certificate the final step in the administrative process."
> (Emphasis added)

In *Civil Aeronautics Board* v. *Delta Airlines,* 367 U.S. 316, this court refused to allow the C.A.B. to alter a certificate of public convenience and necessity which had been granted to Delta Airlines. In so doing, the Court stated at page 325:

> "* * * [T]o the extent there are uncertainties over the Board's power to alter effective certificates, *there is an identifiable Congressional intent that these uncertainties be resolved in favor of the certificated carrier* and that the specific instructions set out in the statute should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers.' We do not quarrel with those who would grant the Board great discretion to conjure with certificates prior to effectuation. But, we feel that we would be paying less than adequate deference to the intent of Congress were we not to hold that, after a certificate has gone into effect, the instructions set out in the statute are to be followed scrupulously."
> (Emphasis added)

In *Delta, supra,* this Court again referred with approval to *Seatrain, supra,* and reaffirmed the rule "that supervising agencies desiring to change existing certificates must follow the procedures 'specifically authorized' by Congress and cannot rely on their own

motions of implied powers in the enabling act." (at page 334).

The precedents above cited make three propositions abundantly clear.

a. An unambiguous certificate must be interpreted solely on the language therein contained.

b. A certificate of public convenience and necessity may not be modified by implication or through the guise of interpretation.

c. Modification or revocation of a certificate can only be accomplished through the revocation procedure set forth in the statute.

To conclude on this point we now have direct conflict between the principle that certificates must be interpreted in accordance with their terms and the implied principle espoused by the Commission and embraced by the District Court to the effect that certificate interpretation need not be certain and final but may have varied meanings depending upon their use by the holders even if such use is specifically authorized.[2]

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[2] In his report the Examiner found:

> "If petitioner's Eastern Shore terminal were at Bridgeville rather than Federalsburg, and all of its less-than-truckload Eastern Shore traffic were routed through such terminal, the examiner believes that its operation on such type of traffic having an origin and destination both in Maryland would not be seriously subject to question." (At p. 4)

Since the Commission adopted the fact findings and ultimate conclusions of the Examiner, it, as well as the District Court, apparently accepts a concept of variable meanings for certificates. Can it be that an interstate certificate or permit can be changed depending only on the change of terminal location? Can appellant reasonably be expected to relocate its major terminal facility at great inconvenience and expense or does such result suggest a violation of the Fifth Amendment referred to by this Court in *Delta, supra,* at page 331?

It is clear that the "interpretation" of appellant's certificate in this case is contrary to its literal terms, within the meaning of the above rules, since "interstate commerce" is defined in Section 203(a)(10) of the Interstate Commerce Act as, in part, commerce "between places in the same state through another state", without mention of "economic justification". In any event, if the Commission, and the District Court in this case, had made an effort to ascertain whether there was "economic justification" for the operations at the time of the issuance of the certificate in question, they would have found in the Commission's report and order in *Service Trucking, Inc., Extension of Operations—Eastern Shore,* 46 M.C.C. 465, that issuance was predicated in part on demand for transportation between shippers on the Maryland mainland and consignees on the Maryland Eastern Shore, and vice versa.

II. The Questions Presented Are Not Foreclosed By Decisions of This Court.

During the course of the last decade, this Court has been called upon to consider issues quite similar to but not identical with those raised in this proceeding. In 1959, in *Service Storage and Transfer Company, Inc., supra,* this Court reversed the Virginia Court of Appeals which had held that the petitioner there could not lawfully conduct operations between points in Virginia through Bluefield, West Virginia, despite the fact that petitioner held a certificate from the Interstate Commerce Commission literally authorizing the questioned operations. Soon thereafter, in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utilities Commission,* 361 U.S. 11, this Court granted a writ of certiorari and (citing *Service Storage, supra*) reversed the judgment of the Superior Court of Pennsylvania, holding that Jones,

the petitioner, could not lawfully conduct operations between Pennsylvania points over certificated interstate routes through New Jersey. More recently (January 20, 1964), in *Arrow Carrier Corp.* v. *United States*, 375 U.S. 452, this Court affirmed the United States District Court for the District of New Jersey's sustaining of an Interstate Commerce Commission holding that operations conducted by the appellant between Pennsylvania points through New Jersey were not authorized by, or constituted an "abuse" of, its interstate certificate of public convenience and necessity. Four months later (May 18, 1964) in *Highway Express Lines, Inc.* v. *Jones Motor Co., Inc.*, 377 U.S. 217, this Court affirmed a judgment of the United States District Court for the Eastern District of Pennsylvania (one of three District Judges dissenting) setting aside an order of the Interstate Commerce Commission holding that operations conducted by the appellee, Jones Motor Co., Inc., between points in Pennsylvania through New Jersey, were unlawful although authorized by the carrier's interstate certificate. In that case, three of the justices of this Court were of the opinion that probable jurisdiction should have been noted.

Although, as indicated above, this Court has had before it a number of cases involving issues similar to those present in this case, its disposition of the cases cited above was not accompanied by an opinion, except in *Service Storage and Transfer Co., Inc., supra.* The two most recent cases, *Arrow Carrier Corp., supra,* and *Highway Express Lines, Inc., supra,* decided only four months apart, were disposed of on motions to affirm where the decisions of the three-judge district courts and the rationale supporting them appear to be irreconcilable.

In *Hudson Transport Co.* v. *United States,* 219 F. Supp. 43 (D. N.J. 1963), the operations complained of before the Interstate Commerce Commission were the transporting of shipments between Pennsylvania shippers and Pennsylvania consignees over highways passing through New Jersey, pursuant to separate grants of interstate authority, which were "tacked" together (the Interstate Commerce Commission generally permits "tacking" of separate grants of authority, as long as the intended character of the operations over each grant is preserved) but without intrastate authority from the Pennsylvania Public Utility Commission. The three-judge district court dismissed a complaint to set aside the Commission's cease and desist order in substance on the basis that there was substantial evidence supporting the Commission's finding that there was no economic justification for the interstate routing, and that the substantive rule applied by the Commission (lack of economic justification for the interstate routing equals subterfuge to evade state law) was a "fair test for evaluating the operations . . . " *Jones Motor Co.* v. *United States,* 218 F. Supp. 133 (D. Pa. 1963) involved substantially the same facts, except that all of the Pennsylvania-Pennsylvania shipments in question were commingled in the same vehicles with shipments moving between Pennsylvania points and points outside Pennsylvania, although, as in *Hudson,* there were no pickups or deliveries in New Jersey. Despite some language suggesting that it was applying the substantial evidence rule in setting aside the Commission's conclusion of no economic justification, the three-judge district court, in substance, held that since the later acquired of the two tacked or combined certificates specified that it could be "unified with rights, otherwise . . . embraced in a certificate in [the carrier's]

name", the Commission's order did not constitute an interpretation, and the proper remedy for unforeseen use of certificates lay in § 212(a) proceedings.

Without regard to the apparent conflict between *Arrow Carrier Corp., supra,* and *Highway Express Lines, Inc., supra,* both in reasoning and result, it appears safe to assume that the law governing disposition of the issues presented here is that contained in the only decision of this Court which was accompanied by a reasoned opinion. In short, the doctrine of *Service Storage and Transfer, supra,* should be applied, and if applied appellant asserts it comes within the rule of that case for the reason that its certificate "on its face" authorizes the operations in question.

III. The Need For A Return to Certainty

The provisions of Section 208(a) of the Motor Carrier Act (49 U.S.C. § 308) requires the Commission in issuing certificates to "specify the service . . . and the routes . . . [and/or] the territory within which, the motor carrier is authorized to operate". Historically, the Interstate Commerce Commission has attempted to comply with the statutory requirement so as to permit the certificate holder, its competitors, and the public to readily determine the scope and character of the authority granted. *Atlantic Freight Lines, Inc., Petition for Declaratory Order,* 51 M.C.C. 175. Where operations under a certificate were intended to be limited, appropriate restrictive language was conventionally imposed by the Commission (51 M.C.C. 188-189). Not only are certificated operations to be easily ascertainable from the terms of document but the issuance of the certificate marked the end of the proceeding. *Seatrain, supra.*

As evidenced by *Service Storage and Transfer, supra, Jones Motor, supra,* and *Arrow, supra,* and numerous other lower court and Commission cases, there has been a continuing unrest and conflict with respect to the jurisdiction that may be asserted either by the Interstate Commerce Commission or State authorities in situations involving traffic movements by certificated interstate motor carriers between points in the same state through an adjoining state. Stated succinctly, the past litigation demonstrates that there has been a growing uncertainty concerning the scope of operations authorized to be conducted by federally certificated motor carriers holding authority between points in the same state. Assumption by this Court of jurisdiction over this case appears to present an opportunity to eliminate a species of uncertainty in the construction or interpretation of certificates of public convenience and necessity that is manifestly inconsistent with the intent of Congress when it enacted the Motor Carrier Act of 1935.

Failure to reestablish easily ascertained and fixed standards of certificate interpretation will undoubtedly perpetuate and extend the growing trend of litigation in this field. Practical considerations strongly suggest that plenary consideration of the issues raised here is necessary. It is this—there are 18,000 or more federally regulated for-hire motor carriers of property, either contract carriers (by permit) or common carries (by certificate). Although there is no practical way to determine the total number or percentage of for-hire carriers that hold authority to conduct operations between points in the same state through a sister state, it may be fairly stated that hundreds, if not thou-

sands, of regulated interstate carriers have such authority. In the absence of a return to certainty, the evils foreseen by Commissioner Herring in his well-reasoned dissent in *Pennsylvania Public Utilities Commission* v. *Hudson Transportation Co., Inc.*, 88 M.C.C. 745, will undoubtedly come into being. He predicted that prohibiting interstate carriers from rendering service between points in the same state as authorized by their certificates "would involve the application of a vague and uncertain doctrine which would make the meaning of certificates uncertain and which may involve the Commission in interminable arguments as to when a carrier may or may not perform such transportation". (At p. 752) Moreover, the continuing uncertainty promises to encourage state commissions and intrastate carriers to attack the validity of interstate certificates and undoubtedly develop unnecessary litigation.

IV. The Questions Presented Require For Their Resolution Plenary Consideration With Briefs On the Merits and Oral Argument

Since 1959, questions similar to those presented here have been before this Court in at least four occasions. On only one occasion, in *Service Storage & Transfer, supra,* did this Court accompany its decision with an opinion, and the repeated requests by motor carriers or state authorities for review by this Court of issues similar to those decided in 1959, indicate quite clearly that the issues remain unsettled and there still remains much doubt in this field of the law.

The need here for plenary consideration seems to parallel the need recently found by this Court in *Federal Power Commission* v. *Southern California Edison Company,* 376 U.S. 205, where, in connection

with the construction to be placed on certain provisions of the Federal Power Act, it stated (at p. 210):

> "* * * Congress meant to draw a bright line easily ascertained, between State and Federal jurisdiction making unnecessary such case by case analysis. This was done in the Power Act by making Federal Power Commission jurisdiction plenary and extending it to all wholesale sales in interstate commerce, except those which Congress has made explicitly subject to regulation by the States."

CONCLUSION

Probable Jurisdiction Should Be Noted.

Respectfully submitted,

FRANCIS W. MCINERNY
ROBERT G. MILLER
Attorneys for Appellant
Service Trucking Co., Inc.

Of Counsel:

MACDONALD & MCINERNY
1000 16th Street, N.W.
Washington, D. C. 20036

Dated August 5, 1965.

Certificate of Service

In compliance with Rules 13(2) and 33(1), (2) and (3-b) of the Revised Rules of the Supreme Court of the United States, I, Francis W. McInerny, one of the attorneys for the appellant Service Trucking Co., Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as indicated below.

This, the 5th day of August, 1965.

FRANCIS W. MCINERNY

Copies served in duly addressed envelopes with first class postage prepaid:

Thomas J. Kenney, United States Attorney
for the District of Maryland
Baltimore, Maryland

The Solicitor General
Department of Justice
Washington, D. C.

Honorable William H. Orrick, Jr.
Asst. Attorney General for the United States
Department of Justice
Washington, D. C.

John H. D. Wigger, Attorney
Department of Justice
Washington, D. C.

Robert W. Ginnane, Esq., General Counsel
Interstate Commerce Commission
Washington, D. C.

H. Neil Garson, Esq., Associate General Counsel
Interstate Commerce Commission
Washington, D. C.

William J. Little, Esq. and
John R. Norris, Esq.
1513 Fidelity Building
Baltimore, Maryland 21201

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 15249

SERVICE TRUCKING COMPANY, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*.

and

KENT FREIGHT LINES, INC.,
PRESTON TRUCKING COMPANY, INC.
and
VICTOR LYNN LINES, INC.,
Intervenors.

Filed: April 2, 1965

Before: Sobeloff, Circuit Judge, and Thomson and Winter, District Judges.

Francis W. McInerny (Robert G. Miller, Joseph M. Roulhac, Macdonald & McInerny, and Smith, Somerville & Case, on brief), for Plaintiff.

H. Neil Garson, Associate General Counsel, Interstate Commerce Commission (William H. Orrick, Jr., Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Thomas J. Kenney, United States Attorney, and Robert W. Ginnane, General Counsel, Interstate Commerce Commission, on brief), for Defendants.

William B. Little (John N. Norris, on brief), for Intervenors, Kent Freight Lines, Inc., Preston Trucking Company, Inc., and Victor Lynn Lines, Inc., Intervening Defendants.

Winter, District Judge:

Service Trucking Company, Inc. (Service) sought a declaratory order, under the provisions of § 5(d) of the

Administrative Procedure Act, 5 U.S.C.A. § 1004(d), or, alternatively, an order interpreting its certificate of public convenience and necessity theretofore issued by the Interstate Commerce Commission. It sought to have decided that operations by it between Baltimore and Points in Maryland east of the Chesapeake Bay, when conducted through another state under the circumstances hereafter outlined, are operations in interstate commerce, and authorized by its certificate.[1]

The Commission found against Service, and admonished Service to discontinue such operations. *Service Trucking Company, Inc. Petition for Declaratory Order,* 94 M.C.C. 222 (1963). Service then sued pursuant to the provisions of 28 U.S.C.A. § 1336, and the matter has been submitted to the Court, convened pursuant to 28 U.S.C.A. § 2325, on the record made before the Interstate Commerce Commission, the oral arguments and briefs of Service, defendants, and certain interested motor carriers who were permitted to intervene.[2]

The findings of the Commission are not controverted, nor is there any claim that they are not supported by substan-

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[1] Service's certificate permits the carriage, over irregular routes of "Agricultural commodities, live and dressed poultry, canned goods, preserved foods, forest products, seafood and empty containers * * * from, *inter alia,* "points and places in * * * Maryland * * * to * * * points and places in Maryland on and east of U. S. Highway 15 * * *." The carriage of general commodities, with the usual exceptions, is also permitted "from points and places in the above-described destination territory to points and places in * * * Maryland * * *."

[2] These carriers, Kent Freight Lines, Inc., Preston Trucking Company, Inc., and Victor Lynn Lines, Inc., for practical purposes initiated this litigation. They filed complaint proceedings against Service before the Public Service Commission of Maryland alleging that Service engaged in intrastate regulated carriage, i. e., less-than-truckload shipments, for which it was not certificated. In an effort to obtain a declaration that the complaint of transportation was validated by its I.C.C. certificate, Service instituted the proceeding described in the opening paragraph of the text.

tial evidence. Except for minor supplementation, they were as recommended by the examiner and in essential respects follow:

"'Petitioner, for many years, has been transporting freight between points in Maryland, Delaware, and Virginia on the Delmarva Peninsula and points in the other areas it is authorized to serve. It maintains terminals as here pertinent at Baltimore and Federalsburg, and all shipments from the Baltimore area, and from points south and west thereof, move to points on the Delmarva Peninsula through its Baltimore and Federalsburg terminals. Initially, petitioner was primarily a carrier of freight, in truckloads, or volume quantities, for which no operating franchise was required in Maryland on intrastate traffic, but *beginning sometime after 1953, petitioner increased the handling of less-than-truckload shipments and a large portion of its activity is now in this phase of transportation.* Some of this traffic consists of shipments from one Maryland point to another. Principally from the Baltimore area to points on Maryland's Eastern Shore, and such shipments are combined at the Baltimore terminal with less-than-truckload shipments from points beyond Maryland. *The consolidated shipments are then transported in motor vehicles over routes in Maryland to the Delaware-Maryland boundary line, thence over Delaware Highway 404 to Bridgeville, thence over Delaware and Maryland State highways to Federalsburg, hereinafter called the Bridgeville route.* There the individual shipments are distributed by "peddle operations" to their ultimate destinations on the Delmarva Peninsula. *On shipments from points on the peninsula the procedure is reversed. Use of the Bridgeville route results in a circuitous between-terminals operation of approximately 12 miles when compared with the direct Maryland routes between the Chesapeake Bay Bridge and Federalsburg. Petitioner*

asserts that it traverses the circuitous route through Delaware solely for the purpose of complying with its interstate certificate, but, admittedly, it utilizes the direct all-Maryland routes for nonregulated Maryland intrastate traffic and for shipments to points in Maryland already in the atroam of interstate commerce. Petitioner's evidence presented by the Preston Company shows that the latter carrier also routes certain less-than-truckload traffic having both origin and destination in Maryland over routes of some circuity through Delaware. Such routing, however, is for purposes of operating efficiency and economics necessitated in the handling of less-than-truckload traffic through terminals in Delaware, and no showing is made that any unlawful operations have arisen therefrom." (emphasis supplied)

Based upon these findings, the Commission concluded that "* * * petitioner by engaging in the considered transportation is attempting in bad faith to convert to interstate movements traffic which, but for its routing, is actually in intrastate commerce subject to the laws of Maryland."

As we have stated, Service makes no claim that the findings of fact made by the Commission are not supported by substantial evidence, and Service can make no claim that the Commission lacked jurisdiction to interpret the certificates of public convenience and necessity which it had theretofore issued. *Service Storage & Transfer Co., Inc.* v. *Virginia,* 359 U.S. 171 (1959). From the findings of fact, the conclusion is inescapable that Service's only purpose in routing less-than-truckload shipments via Bridgeville, Delaware is to attempt to make legal, by converting into interstate shipments, shipments in intrastate commerce for which Service lacks authority from the Public Service Commission of Maryland. That such a purpose is in bad faith and a subterfuge warranting an order to cease and desist has been decided in *Hudson Transportation*

Company v. *United States*, 219 F.S. 43 (D. N.J. 1963), *aff'd. sub nom. Arrow Carrier Corporation* v. *United States*, 375 U.S. 452 (1964). See also, *Jones Motor Co.* v. *United States*, 218 F.S. 133 (E.D. Pa. 1963), *rehearing den.* 223 F.S. 835 (E.D. Pa. 1963), *aff'd. sub nom. Highway Express Lines, Inc.* v. *Jones Motor Co., Inc.*, 377 U.S. 217 (1964).

Service attempts to distinguish the *Hudson Transportation* case on the ground that (a) it involved a problem of "tacking" certificates of public convenience and necessity where there was absent any finding that public convenience and necessity required "tacking" and (b) the degree of circuity in the case at bar (15%) is considerably less than the degree of circuity (50% in some cases) proved in that decision. We do not think that what was decided in the *Hudson Transportation* case may be so limited. Rather, the breadth of its holding, affirmed by the Supreme Court, is dispositive of the case here.[3] The *Jones Motor* case is not to the contrary. On facts distinguishable from those

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[3] 219 F. S., at pp. 49-50:

"From all of the evidence in these two suits the unavoidable conclusion is that the Hudson and Arrow routes involved are not logical and normal operations through their headquarters, that the use by Hudson and Arrow of their tacked on routes is a deliberate, calculated method employed by those carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth. Said evidence overwhelmingly points to those tacked on routes as artificial, contrived arrangements adopted by Hudson and Arrow in order to obtain desirable Pennsylvania intrastate business which would be otherwise unavailable to them. The record makes it very clear that we are here dealing not with bona fide transportation in interstate commerce but with a mystic mase route which is a more or less shrewd expedient designed solely to escape the control of the Pennsylvania Commission. In the full sense of the word, the operations are subterfuges."

in the case at bar, the Court found no subterfuge to avoid the necessity of obtaining Pennsylvania operating permits. The case was thus decided on a lack of evidence to show bad faith or subterfuge, rather than a departure from the governing principle to be applied where, as here, no logical basis for circuity, except that of subterfuge, has been shown.[4]

Perceiving no errors, factual or legal in the order of the Commission denying Service's petition for a declaratory order, we deny the injunctive relief prayed in the

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[4] The opinions of the dissenting Circuit Judge on the merits, 213 F. S. 139, and on rehearing, 223 F. S. 836, make clear that his difference with the majority was purely factual and that the majority found a factual, logical basis for circuity such as to render the truck's journey interstate.

Significant, also, is a memorandum filed in the Supreme Court of the United States, on behalf of the United States and the Interstate Commerce Commission in the *Jones Motor* case. In the memorandum the Solicitor General expressed the view that "* * * the governing principles in this type of case have recently been established by *Arrow Carrier Corp.* v. *United States and Interstate Commerce Commission*, 375 U. S. 452." It was added "As we pointed out in our motion to affirm filed in *Arrow*, it seems clear that there is no conflict between that case and the instant one as to the exent of the Commission's power. The only issue here is the application of the proper standards to the particular evidence of the case." Finally, it was said "* * * we believe that the Commission was warranted in concluding that the operations of Jones were a subterfuge since it found (a) that there had been circuitous routing and (b) that there was no showing by Jones that it performed any necessary service or operation on these shipments when they were transported through New Jersey. * * * However, as indicated above, the reasons for plenary consideration do not appear compelling in the light of this Court's disposition of the *Arrow* litigation."

nplaint, and dismiss it. Counsel may agree on a form order.

.....
United States Circuit Judge

.....
Chief Judge
United States District Court
for the District of Maryland

.....
United States District Judge
United States District Court
for the District of Maryland

APPENDIX B

Served Jan. 13, 1964

M-10958

INTERSTATE COMMERCE COMMISSION

No. MC-C-3446

Service Trucking Company, Inc., Petition for Declaratory Order

Decided December 17, 1963

Upon petition, petitioner's operations in transportation of shipments between points in Maryland through Delaware found to be a subterfuge to evade the laws of Maryland and not authorized by its certificate. Petitioner admonished to discontinue its unlawful operations. Petition denied.

Francis W. McInerny and *John Guandolo* for petitioner.

William J. Little and *John R. Norris* for interveners in opposition to the petition.

Joseph S. A. Giardina for the Public Service Commission of Maryland.

REPORT OF THE COMMISSION ON PETITION
DIVISION 1, COMMISSIONERS HUTCHINSON, HERRING, AND TIERNEY

HUTCHINSON, *Commissioner:*

Exceptions to the order recommended by the examiner were filed by petitioner, and motor carrier interveners jointly replied.

This report deals with a petition filed October 17, 1961, by Service Trucking Company, Inc., of Federalsburg, Md., under section 5(d) of the Administrative Procedure Act for a declaratory order, or, alternatively for an order interpreting certificate No. MC-75185 (Sub-No. 9) as respects

its right to engage in the transportation of property, in interstate or foreign commerce from points in Maryland to points in that State through Bridgeville, Del. Kent Freight Lines, Inc., Preston Trucking Company, Inc., hereinafter called Preston Company and Victor Lynn Lines, Inc., intervened in opposition to the petition and collectively replied thereto. The Public Service Commission of Maryland intervened as an interested party without taking a position or filing a reply.

Pursuant to proceedings in *Service Trucking Co., Inc., Extension-Eastern Shore,* 46 M.C.C. 465, petitioner is authorized to operate as a motor common carrier over irregular routes, *inter alia,* (1) of agricultural commodities live and dressed poultry, canned goods, preserved foods, forest products, seafood, and empty containers, as follows:

> From points and places in Delaware, Maryland, and Virginia east of Chesapeake Bay and south of the Chesapeake and Delaware Canal,[1] to Norfolk, Portsmouth, and Richmond, Va., points and places in New Jersey, the District of Columbia, points and places in Maryland on and east of U. S. Highway 15 * * *.

(2) of general commodities, with the usual exceptions, as follows:

> From points and places in the above described destination territory to points and places in Delaware, Maryland, and Virginia east of Chesapeake Bay and south of the Chesapeake and Delaware Canal.

The issue presented here arose upon a complaint before the Public Service Commission of Maryland filed on or about September 20, 1961, by motor carrier interveners

[1] The Area of Delaware, Maryland, and Virginia east of Chesapeake Bay and south of the Chesapeake and Delaware Canal is hereinafter called the Delmarva Peninsula. That portion of Maryland in this area is called the Eastern Shore of Maryland.

herein, alleging, among other things, that the petitioner is engaged in transportation of less-than-truckload shipments between Baltimore, Md., and points on the Eastern Shore of Maryland through Bridgeville without the requisite permit required from that regulatory agency. The complaint before the Maryland commission further charges petitioner with use of its interstate certificate in an unlawful manner in order to evade the laws of Maryland. By mutual agreement and permission from the Public Service Commission, the parties agreed to incorporate the evidence adduced herein in the pending State proceeding.

Th examiner recommended that the petition be denied. He found that operations by petitioner in transporting through Delaware shipments having both origin and destination at points in Maryland are for the purpose of evading the regulation of Maryland, and do not constitute operations authorized by its certificate. On exceptions, petitioner contends (1) that the examiner's findings are not supported by substantial evidence and the law; (2) that it lawfully may operate between points in Maryland over routes through Delaware under the terms of its certificate, which, it insists, are clear and not subject to challenge on the grounds of ambiguity; (3) that the considerations of good faith and of motive of petitioner in performing the considered operations are irrelevant in determing the status thereof; (4) that to permit such considerations to be governing factors in determining the meaning of certificates would invite challenge of every outstanding certificate where operations in interstate commerce between points in the same State are authorized; and (5) that the examiner's findings are inconsistent with Federal regulation of interstate traffic. It argues that the examiner, like the Virginia State Corporation Commission in *Service Storage & Transfer Co., Inc.*, v. *Virginia*, 359 U.S. 171, improperly inferred subterfuge by petitioner solely from its routing of Maryland shipments over a route through Bridgeville, Del., and that he erred in placing such opera-

tions in a substantially identical position to the operations involved in *Pennsylvania Public Utility Comm.* v. *Hudson Transp. Co.*, 83 M.C.C. 729, and on reconsideration, 88 M.C.C. 745, hereinafter called the *Hudson* case.

In reply, interveners collectively take issue with each of the matters raised on exceptions, and urge that the examiner's recommendation denying the relief requested be approved. They argue that the considered operations are not bona fide interstate commerce, and that the Maryland commission is competent to determine what is, or is not, intrastate commerce within its jurisdiction.

The evidence adduced, the examiner's recommendation, the exceptions, and the reply thereto have been considered. We find the examiner's statement of facts to be correct in all material respects; and as supplemented herein, we adopt it as our own. We have considered and hereby overrule interveners' motion to strike the testimony of the representative of Preston Company, called by petitioner as a hostile witness. Such evidence is in no way prejudicial to interveners and although of little weight is relevant to the determination of the bona fides of petitioner's operation.

Petitioner, for many years, has been transporting freight between points in Maryland, Delaware, and Virginia on the Delmarva Peninsula and points in the other areas it is authorized to serve. It maintains terminals, as here pertinent, at Baltimore and Federalsburg, and all shipments from the Baltimore area, and from points south and west thereof, move to points on the Delmarva Peninsula through its Baltimore and Federalsburg terminals. Initially, petitioner was primarily a carrier of freight, in truckloads, or volume quantities, for which no operating franchise was required in Maryland on intrastate traffic, but beginning sometime after 1955, petitioner increased the handling of less-than-truckload shipments, and a large portion of its activity is now in this phase of transportation. Some of this traffic consists of shipments from one

Maryland point to another, principally from the Baltimore area to points on Maryland's Eastern Shore, and such shipments are combined at the Baltimore terminal with less-than-truckload shipments from points beyond Maryland. The consolidated shipments are then transported in motor vehicles over routes in Maryland to the Delaware-Maryland boundary line, thence over Delaware Highway 404 to Bridgeville, thence over Delaware and Maryland State highways to Federalsburg, hereinafter called the Bridgeville route. There the individual shipments are distributed by "peddle operations" to their ultimate destinations on the Delmarva Peninsula. On shipments from points on the peninsula the procedure is reversed. Use of the Bridgeville route results in a circuitous between-terminals operation of approximately 12 miles when compared with the direct Maryland routes between the Chesapeake Bay Bridge and Federalsburg. Petitioner asserts that it traverses the circuitous route through Delaware solely for the purpose of complying with its interstate certificate, but, admittedly, it utilizes the direct all-Maryland routes for nonregulated Maryland intrastate traffic and for shipments to points in Maryland already in the stream of interstate commerce. Petitioner's evidence presented by the Preston Company shows that the latter carrier also routes certain less-than-truckload traffic having both origin and destination in Maryland over routes of some circuity through Delaware. Such routing, however, is for purposes of operating efficiency and economies necessitated in the handling of less-than-truckload traffic through terminals in Delaware, and no showing is made that any unlawful operations have arisen therefrom.

Discussion and Conclusions

The Supreme Court, in *Service Storage & Transfer Co., Inc.* v. *Virginia, supra,* removed any doubt that the Commission has the authority and initial responsibility of interpreting its certificates. Thereafter, the Commission

made clear in its report on reconsideration in the *Hudson* case, at page 748, that although the concept of interstate commerce embraces a movement between points in one State through another, nevertheless when operations are conducted under the terms of a Commission certificate solely for the purpose of evading State regulation of the traffic concerned, then such operations are in bad faith, violative of the provisions of the Interstate Commerce Act, and an appropriate action may ensue under the provisions of section 204(b) of such act.

No logical reason appears on this record for the present routing of the otherwise intrastate freight other than the fact that petitioner is without intrastate authority to transport it. Petitioner's claim that the considered operations are routed through Bridgeville for reasons of economy and efficiency is without support in the record. This becomes obvious when it is considered that the Bridgeville route is patently circuitous, that petitioner maintains its terminal and break-bulk point at Federalsburg rather than at Bridgeville, and that only those movements which embrace shipments between Maryland points without a prior or subsequent interstate movement are in fact routed through Delaware. All things considered, we conclude that petitioner by engaging in the considered transportation is attempting in bad faith to convert to interstate movements traffic which, but for its routing, is actually in intrastate commerce subject to the laws of Maryland.

The contentions raised by petitioner not discussed herein have been considered, but are without merit, and require no further discussion herein. Suffice it to say that the provisions of section 8(b) of the Administrative Procedure Act, 5 U.S.C.A. 1007(b) do not require findings on all issues raised by the parties, but only on those which are material to a decision. These requirements are satisfied herein. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 193-194.

We find that the considered operations by petitioner between points in Maryland through Delaware in the transportation of shipments having both orgin and destination within Maryland are conducted as a subterfuge for the purpose of evading the laws of Maryland, and are not authorized by petitioner's certificate issued by this Commission. Petitioner is admonished to discontinue such operations. The petition will be denied.

An appropriate order will be entered.

COMMISSIONER HERRING, dissenting.

I am unable to agree with the views of the majority for the reasons stated in my dissenting expression in *Pennsylvania Public Utility Comm.* v. *Hudson Transp. Co.*, 88 M.C.C. 745, 751-754.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 17th day of December A.D. 1963.

No. MC-C-3446

SERVICE TRUCKING COMPANY, INC., PETITION FOR DECLARATORY ORDER

Investigation of the matters and things involved in this proceeding has been made, and said division, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 15249

SERVICE TRUCKING COMPANY, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

KENT FREIGHT LINES, INC.,
PRESTON TRUCKING COMPANY, INC.,

and

VICTOR LYNN LINES, INC., *Intervenors*.

Judgment

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on March 25, 1965, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325 of Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on April 2, 1965, filed its opinion, holding that it perceives no errors, factual or legal, in the order of the Interstate Commerce Commission, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by plaintiff, be, and the same hereby is denied, that its complaint be, and the same hereby is, dismissed; and that

the temporary restraining order entered by the Court on February 18, 1964, be and the same is hereby dissolved.

This the 22nd day of April, 1965.

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ ROSZEL C. THOMSEN
United States District Judge

/s/ HARRISON L. WINTER
United States District Judge

APPROVED as to form:

/s/ FRANCIS W. MCINERNY

.....
Attorneys for Plaintiff

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 15429

SERVICE TRUCKING COMPANY, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

KENT FREIGHT LINES, INC.,
PRESTON TRUCKING COMPANY, INC.,

and

VICTOR LYNN LINES, INC., *Intervenors*.

Order

The motion for rehearing filed by plaintiff in the above entitled case having been read and considered, it is hereby denied this 30th day of April, 1965.

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ ROSZEL C. THOMSEN
United States District Judge

/s/ HARRISON L. WINTER
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 422

SERVICE TRUCKING COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court sustaining a decision of the Interstate Commerce Commission that appellant's op-

erations between points in Maryland over a route through Delaware were not authorized by its interstate certificate (J.S. 15a-16a).

The pertinent facts, which are not in dispute, are as follows: Appellant, a common carrier by motor vehicle, routed certain shipments between Baltimore and points in eastern Maryland through Delaware.[1] Competing carriers instituted a complaint proceeding before the Public Service Commission of Maryland ("P.S.C.") charging appellant with engaging in intrastate transportation without appropriate authority from the State of Maryland, and with using its interstate certificate as a subterfuge to evade the laws of Maryland. Appellant then sought from the Interstate Commerce Commission a declaratory order that its certificate authorizes such operations.

The Commission found (1) that appellant's route through Delaware is approximately 12 miles longer and is less convenient than the route within Maryland (J.S. 12a); (2) that appellant utilizes the direct all-Maryland route for nonregulated Maryland intrastate traffic and for interstate shipments between points in Maryland, and utilizes the route through Delaware only for those shipments between points in Maryland for which it lacks appropriate intrastate authority from the P.S.C. (*ibid.*); and (3) that appellant maintains no terminal in Delaware, and that the record did not support appellant's contention that

---

[1] Appellant's certificate authorizes transportation in interstate commerce between points in Maryland, Delaware, and Virginia and points in Virginia, the District of Columbia, and Maryland (J.S. 9-10).

it routes the traffic through Delaware for reasons of economy and efficiency (J.S. 13a).

The Commission held that appellant "is attempting in bad faith to convert to interstate movements traffic which, but for its routing, is actually in intrastate commerce subject to the laws of Maryland" (J.S. 13a), and admonished appellant to discontinue such operations (J.S. 14a). On appeal, the three-judge court affirmed the Commission's order, holding that "no logical basis for [appellant's] circuity [of routes], except that of subterfuge, has been shown" (J.S. 6a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

The principles governing the Commission's power to prohibit motor carriers from utilizing interstate certificates to evade state regulation of their purely intrastate operations are well established. This Court made it clear in *Service Storage and Transfer Co., Inc.* v. *Virginia*, 359 U.S. 171, that the Commission's authority to interpret its own interstate certificates includes the power to prohibit particular operations that are being conducted as "a subterfuge to escape" state regulation (p. 179). Where the evidence reveals that a carrier's operation between points in the same State over interstate routes is not a "logical and normal operation" (*Service Transfer Co., supra* at 178), the Commission is warranted in concluding that such operation is a subterfuge to avoid State law and an abuse of the carrier's interstate certificate.

Hudson Transportation Co. v. *United States*, 219 F. Supp. 43 (D. N.J.), affirmed *sub nom. Arrow Carrier Corp.* v. *United States*, 375 U.S. 452; *Jones Motor Co., Inc.* v. *United States*, 218 F. Supp. 133 (E.D. Pa.), affirmed *sub nom. Highway Express Lines* v. *Jones Motor Co., Inc.*, 377 U.S. 217. Appellant's argument that the Commission has "modified" the literal terms of its interstate certificate is beside the point. The Commission's established authority to prevent the use of its certificates as a subterfuge to evade state regulation of essentially intrastate operations empowers the Commission to look beyond the literal language of such certificates.

In the present case, the district court upheld, as supported by substantial evidence, the Commission's finding that appellant's circuitous operations through Delaware were conducted "in bad faith and a subterfuge" (J.S. 4a) to evade the laws of Maryland. There is no occasion for further plenary review of this factual determination (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491)—a determination which supports the Commission's conclusion that appellant's certificate does not authorize the challenged operations.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 422

SERVICE TRUCKING COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, KENT FREIGHT LINES, INC., PRESTON TRUCKING COMPANY, INC., AND VICTOR LYNN LINES, INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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SERVICE TRUCKING COMPANY, INC.,
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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, KENT FREIGHT LINES, INC., PRESTON TRUCKING COMPANY, INC., AND VICTOR LYNN LINES, INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees, Kent Freight Lines, Inc., Preston Trucking Company, Inc. and Victor Lynn Lines, Inc., pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment and decree, entered on April 22, 1965, and from Order denying appellant's motion for rehearing entered on April 30, 1965, by a specially constituted district court of three

judges, dismissing appellant's complaint seeking to set aside a Decision and Order of the Interstate Commerce Commission.

The above named corporations are common carriers by motor vehicle and transport property in interstate and foreign commerce by virtue of certificates of public convenience and necessity issued to each of them by the Interstate Commerce Commission. They also transport property in intrastate commerce in Maryland by virtue of permits issued to each of them by the Public Service Commission of Maryland. Appellant, Service Trucking Company, Inc. does not hold a permit to transport property in intrastate commerce within the State of Maryland. It does hold a certificate of public convenience and necessity issued by the Interstate Commerce Commission which in pertinent part, authorizes the transportation in interstate and foreign commerce of general commodities, with the usual exceptions, from points and places in Maryland on and east of U.S. Highway 15 to points and places in Delaware, Maryland and Virginia, east of the Chesapeake and Delaware Canal (J.S. 10).

On September 14, 1961, appellee motor carriers, commenced a proceeding before the Public Service Commission complaining that Appellant was transporting freight locally between Baltimore, Md. and the Eastern Shore of Maryland without a permit from the Public Service Commission of Maryland, and was conducting such operations between its Baltimore and Federalsburg, Md. terminals by causing its line-haul vehicles to go by way of Bridgeville, Del. as a subterfuge and for the sole purpose of evading the jurisdiction of the Public Service Commission of Maryland, and that such operations were not, "bona fide" interstate commerce. This complaint proceeding is still pending. On October 17, 1961, Appellant filed a petition with the

Interstate Commerce Commission under Section 5(d) of the Administrative Procedure Act for an Order, declaring:

a). That Petitioner's certificate authorizes interstate operations between Baltimore and points on the Eastern Shore of Maryland providing such operations are conducted through a sister state;

b). The good faith of Petitioner's operations between Baltimore and points on the Eastern Shore of Maryland so long as they are conducted through a sister state, may not be challenged in a state forum for the issue of good faith has been conclusively determined by the Interstate Commerce Commission in its issuance of the certificate.

Among other findings, the Commission found (J.S. 13a-14a):

> "No logical reason appears on this record for the present routing of the otherwise intrastate freight other than the fact that petitioner is without intrastate authority to transport it. Petitioner's claim that the considered operations are routed through Bridgeville for reasons of economy and efficiency is without support in the record. This becomes obvious when it is considered that the Bridgeville route is patently circuitous, that petitioner maintains its terminal and break-bulk point at Federalsburg rather than at Bridgeville, and that only those movements which embrace shipments between Maryland points without a prior or subsequent interstate movement are in fact routed through Delaware. All things considered, we conclude that petitioner by engaging in the considered transportation is attempting in bad faith to convert to interstate movement of traffic which, but for its routing, is actually in intrastate commerce subject to the laws of Maryland."
>
> * * * * * *
>
> "We find that the considered operations by petitioner between points in Maryland through Delaware in the transportation of shipments having both origin and

> destination within Maryland are conducted as a subterfuge for the purpose of evading the laws of Maryland, and are not authorized by petitioner's certificate issued by this Commission. Petitioner is admonished to discontinue such operations. The petition will be denied."

In addition to the finding of the Commission, quoted by Appellant under the caption "(d) The Questioned Operations" (J.S. 13-14), the Commission also found:

> ". . . Petitioner asserts that it traverses the circuitous route through Delaware solely for the purpose of complying with its interstate certificate, but admittedly, it utilized the direct all-Maryland routes for non-regulated Maryland intrastate traffic and for shipments to points in Maryland already in the stream of interstate commerce. . . ." (J.S. 12a-J.S. 4a.)

On appeal, the three judge court affirmed the Commission, stating:

> "The findings of the Commission are not controverted, nor is there any claim that they are not supported by substantial evidence. . . ." (J.S. 3a.)
>
> * * * * * *
>
> "As we have stated, Service makes no claim that the findings of fact made by the Commission are not supported by substantial evidence, and Service can make no claim that the Commission lacked jurisdiction to interpret the certificates of public convenience and necessity which it had heretofore issued. *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959). From the findings of fact, the conclusion is inescapable that Service's only purpose in routing less-than-truckload shipments via Bridgeville, Delaware is to attempt to make legal, by converting into interstate shipments, shipments in intrastate commerce for which Service lacks authority from the Public Service Commission of Maryland. That such a purpose is in bad faith and a subterfuge warranting an order to cease and desist

has been decided in *Hudson Transportation Company v. United States*, 219 F.S. (D.N.J. 1963), aff'd. sub nom. *Arrow Carrier Corporation v. United States*, 375 U.S. 452 (1964). See also *Jones Motor Co. v. United States*, 218 F.S. 133 (E.D. Pa. 1963), rehearing den. 223 F.S. 835 (E.D. Pa. 1963), aff'd. sub nom. *Highway Express Lines v. Jones Motor Co., Inc.*, 377 U.S. 217 (1964). (J.S. 4a-6a.)

ARGUMENT

THIS APPEAL INVOLVES NO SUBSTANTIAL QUESTION WARRANTING PLENARY CONSIDERATION BY THIS COURT.

1. As approved by this Court in *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959), Appellant invoked the jurisdiction and responsibility of the Interstate Commerce Commission to interpret its certificate and sought to have affirmed (as a defense to the complaint proceedings before the Public Service Commission of Maryland) in the declaratory proceedings before the Interstate Commerce Commission one or both of two propositions framed by the Appellant. Appellant at J.S. 18 refers to statement of Intervening Defendants on brief before the court below and quotes only part of the statement out of context in support of its argument that the certificate literally construed authorizes the questioned operations. Intervening Defendants did not concede that the questioned operations are authorized by the *proper* interpretation of the literal terms of the certificate. On Brief below (page 12) the Appellant contended:

> "Despite Plaintiff's request for a finding with respect to the literal interpretation of its certificate, neither the Examiner nor the Commission itself made any specific finding on that issue. Since the Certificate language is clear and unambiguous and is susceptible of but one interpretation and that interpretation involves a pure question of law, the Court is requested

> to find, since the Commission refused to do so, that the portion of the certificate involved authorizes interstate operations between Eastern Shore points in Maryland and the Baltimore area. *Intervening defendants here concede in the proceeding that literal interpretation of the certificate 'does authorize interstate operations between Baltimore and points on the Eastern Shore of Maryland. . . .' in their reply to plaintiff's petition to the Commission* but they sought by implication to add restrictive terms to Plaintiff's authority." (Emphasis supplied.)

To the foregoing Intervening Defendants replied (only portion of which is quoted by Appellant at J.S. 18) in pertinent part:

> "*If this is all that Plaintiff sought, it comes as something of a surprise for* we now and at all times wholeheartedly agree this Certificate literally authorizes interstate operations between Eastern Shore points in Maryland and the Baltimore area. *However, this is not the finding sought by the Plaintiff in its Petition for Declaratory Order from the Interstate Commerce Commission.* Rather it sought a Declaratory Order from the Interstate Commerce Commission declaring:
>
> a) That Petitioner's certificate authorizes interstate operations between Baltimore and points on the Eastern Shore of Maryland providing such operations are conducted through a sister state;
>
> b) The good faith of Petitioner's operations between Baltimore and points on the Eastern Shore of Maryland so long as they are conducted through a sister state, may not be challenged in a state forum for the issue of good faith has been conclusively determined by the Interstate Commerce Commission in its issuance of the certificate." (Emphasis supplied.)

The Interstate Commerce Commission may only issue certificates authorizing "bona fide" *interstate* transporta-

tion. Any interpretation of such certificate can only relate to the "bona fide" *interstate* transportation so authorized. To say that the certificate on its face authorizes the carrier to transport property in interstate and foreign commerce between the Eastern Shore points in Maryland and the Baltimore area is not to agree that it may lawfully do so provided the vehicles move in and out of the State of Delaware — 12 miles in and 12 miles back, as in this specific case. The bona fide operation in interstate commerce is the same today as it was when the Certificate was issued, no more and no less. "In" and "out" of Delaware in the manner of the questioned operations for the sole purpose of converting intrastate commerce into a species of interstate commerce in order to evade the jurisdiction of the State of Maryland is clearly not the "bona fide" interstate commerce authorized by the Certificate. Such operations are properly characterized as "mala fide" interstate commerce.

2. The decision of this Court in *Service Storage & Transfer Co., Inc. v. Virginia*, supra, clearly establishes that the competence of the Interstate Commerce Commission to interpret certificates which it had issued extends to matters such as here involved — the use of interstate operating authority as a device to evade lawful State regulation through the device of routing normally intrastate traffic across a State boundary and return. The governing principles regarding the Commission's power and authority in cases of this kind were also subsequently approved in *Hudson Transportation Company v. United States*, 219 F. Supp. 43 (D.N.J. 1963) *aff'd. mem sub nom. Arrow Carrier Corporation v. United States*, 375 U.S. 452 (1964); and *Jones Motor Co., Inc. v. United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *aff'd. on rehearing*, 223 F. Supp. 835, *aff'd. mem sub nom. Highway Express Lines v. Jones Motor Co., Inc.*, 377 U.S. 217 (1964).

In *Service Storage & Transfer Co. v. Virginia,* supra, and which was considered by the Interstate Commerce Commission in *Service Storage & Transfer Co., Inc., Declaratory Order,* 71 M.C.C. 304, there was evidence of circuity in the transportation of less than truckload shipments between points in Virginia via the carrier's terminal at Bluefield West Va., but the operation through the consolidation terminal at Bluefield was natural and logical and actually more efficient than direct operation. Thus in the words of the Commission cited in footnote by this Court in *Service Storage & Transfer Co., Inc.,* supra, 178:

> "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described constitute bona fide transportation in interstate commerce. We find that the operations described between points in Virginia through Bluefield, W. Va., are bona fide operations in interstate commerce within the authority granted to petitioner in Certificate No. MC 3047; Service Storage & Transfer Co., Inc., — Petition for Declaratory Order, 71 M.C.C. 304, 306."

In *Hudson Transportation Co. v. United States,* supra, there was no logical reason for the carrier to route its traffic circuitously through another State except that the carrier lacked authority from the State of Pennsylvania to conduct a more direct operation — thus a mere subterfuge and device calculated to escape the proper jurisdiction of the Commonwealth of Pennsylvania. The two carriers, Hudson Transportation Co. and Arrow Carrier Corporation, if they had held appropriate intrastate authority, admittedly would not have operated as they did via New Jersey in order to serve between Pennsylvania points. In the instant case, if Appellant held the required operating au-

thority from the State of Maryland the traffic between the Maryland points would not have moved circuitously via Bridgeville, Del. but entirely over Maryland highways. In attempting justification of the circuitous operation between terminals in Maryland via Bridgeville, the Commission found:

> ". . . Petitioner asserts that it traverses the circuitous route through Delaware solely for the purpose of complying with its interstate certificate, but admittedly, it utilized the direct all-Maryland routes for non-regulated Maryland intrastate traffic and for shipments to points in Maryland already in the stream of interstate commerce. . . ." (J.S. 4a.)

In the instant case, the court below has upheld the conclusion of the Commission that Appellant's circuitous operations via Delaware were conducted "in bad faith and a subterfuge" (J.S. 4a). There is no good reason or occasion for further review of this determination.

3. Contrary to Appellant's contentions there is no irreconcilable conflict between the *Hudson-Arrow* and *Jones Motor* cases. There is no conflict as to the Commission's jurisdiction and the extent of its power. The three cases are consistent with *Service Storage & Transfer Co.* The lower court in the instant case properly noted that the differences in the *Hudson-Arrow* and *Jones Motor Co.* cases are purely factual.

4. There is no merit to Appellant's contention that the Commission has unlawfully modified or revoked its certificate. The Commission's order simply requires the Appellant to limit its operations under the certificate which it issued to bona fide interstate transportation. Such a direction is "simply a definitive declaration of what rights existed from the very beginning" under the certificate, and, "cannot be equated with modification." *Nelson, Inc. v. United States,* 355 U.S. 554, 599, *reh. denied* 356 U.S. 934.

CONCLUSION

This appeal involves no substantial question warranting plenary consideration by this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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Victor Lynn Lines, Inc.

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No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

SERVICE TRUCKING COMPANY, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 422

SERVICE TRUCKING COMPANY, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

BRIEF OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, Service Trucking Company, Inc. submits this its Brief Opposing the Motions of the appellees, United States of America and Interstate Commerce Commission, Kent Freight Lines, Inc., Preston Trucking Company, Inc., and Victor-Lynn Lines, to affirm the judgment of the District Court.

APPELLEES' CONTENTIONS

The United States and the Interstate Commerce Commission by joint motion and Kent Freight Lines, Inc., Preston Trucking Company, Inc. and Victor Lynn

Lines, Inc., by separate joint motion, move this Court to affirm the action of the United States District Court for the District of Maryland. Both motions assert that this appeal does not present any substantial question warranting plenary consideration by this Court. The contentions underlying appellees' motions may be fairly summarized and expressed as follows:

1. The District Court's action is consistent with the doctrines expressed in *Service Storage and Transfer Co., Inc.* v. *Virginia*, 359 U.S. 717.

2. Without regard to the literal terms of a motor carrier's interstate certificate, the Commission is "warranted" in equating proof that the interstate routes followed between points in the same state are not a "logical and normal operation" with subterfuge to evade state regulation, and in forbidding such operations.

3. The Interstate Commerce Commission is empowered "to look beyond the literal language of * * * certificates" if in the Commission's judgment use thereof by the holder constitutes a subterfuge to evade state regulation.

ARGUMENT

Neither the government nor the private appellees make any real effort to meet the important issues raised by this Appeal. They seek to avoid coming to grips with those questions that have plagued the Commission and the Courts, including this Court, for more than a decade. The points urged by appellees in support of their request for affirmance hereinafter are shown to be based on erroneous interpretation of case authority.

A. This Court's Decision in Service Storage & Transfer Co., Inc. v. Virginia Has Not "Made It Clear" That the Commission May Modify a Certificate Under the Guise of Interpretation

Service Storage, supra, did not "make it clear" that the Commission's authority to interpret its certificates included the power to modify an unrestricted franchise so as to prohibit operations allegedly conducted as "a subterfuge to escape state regulation". This Court there held (1) that where a certificate *on its face* covers the operations, state prosecution based on allegations that interstate operations constitute a subterfuge must be deferred until the Interstate Commerce Commission has interpreted the certificate (see 359 U.S. at 171); (2) that if the certificate, as interpreted, authorizes the questioned operations, state sanctions (permitted in the absence of federal certification)[1] against "subterfuges" are foreclosed; and (3) that in the interests of procedural simplicity states should complain directly to the Interstate Commerce Commission where it is believed that the "operation is not bona fide interstate but is merely a subterfuge to escape the [state's] "jurisdiction". That this Court had no more in mind than application of the conventional tests of certificate interpretation is made clear by the observation:

> ". . . the possibility of a multitude of interpretations of the same federal certificate by several states will be avoided and a uniform administration of the Act achieved." (p. 179)

This Court's admonition to the States to complain first to the Interstate Commerce Commission merely serves to emphasize the fact that the Motor Carrier Act (Section 204(c)) specifically imparts standing to states in complaint proceedings, including the right to

[1] Eichholz v. Public Service Commission, 306 U.S. 268.

institute proceedings involving certificate interpretation questions. However, the State's standing to complain should not be confused with or automatically substituted for proof of unauthorized operation. Proof of illegality must precede relief. This Court's use of the expressions "direct evidence of bad faith" and "abuse of certificate" in *Service Storage* obviously apply to situations where the challenged operations have not been conducted in accordance with a fair interpretation of the literal terms of the certificate, and imply that state prosecution without prior Interstate Commerce Commission interpretation is permissible in such instances. In *Service Storage,* part of the dispositive evidence of "good faith", according to this Court, was that the carrier "enjoyed certificates from the Interstate Commerce Commission authorizing its operations." (at p. 176)

B. The "Logical and Normal Route" or the "Sound Business Purpose" Tests of Interpretation Are Arbitrary, Unrealistic and Contrary to Requirements of Specificity and Certainty in Motor Carrier Certificates and Necessarily Lead to Partial Revocation in Violation of Section 212(a) of the Interstate Commerce Act

The "normal, regular, or usual route" test was first referred to in *Eichholz* v. *Public Service Commission,* 306 U.S. 268, 271. In the circumstances of that case where the carrier held no interstate franchise it was appropriate for Missouri to impose sanctions against operations that were conducted across states lines to defeat state regulation. Since *Eichholz,* economic regulation of interstate commerce by motor vehicle including certification has been delegated exclusively to the federal government and appellant has a certificate literally authorizing the questioned operations.

In this connection it is important to note that this Court in *Eichholz,* (at page 274) stated:

> "We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it."

As stated, Congress has subjected interstate commerce by motor carrier to regulation by the Interstate Commerce Commission, and the latter has specifically authorized the appellant (following extended proceedings) to conduct the questioned operations without restriction (see *Service Trucking Company Ext. of Operations, Eastern Shore,* 46 M.C.C. 465). Had the Commission intended to limit appellants authority through the imposition of a restriction, it could have easily done so. (*Atlantic Freight Lines, Inc., Petition for Declaratory Order,* 51 M.C.C. 175, 188-189.[2])

The "logical and normal route test" and the "sound business purpose test" are shown by a recent decision of the Commission (in which it reversed the Examiner) not only to be too vague and uncertain to satisfy the specificity requirements of Section 208 but also to be impossible of fair application. In its place the Commission has substituted an even more vague and uncertain test which, unlike the former test which has some ascertainable roots in economic theory, incorpo-

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[2] Curiously enough, the Commission as a consequence of the extensive litigation in this field, is now imposing specific restrictions to prohibit operations of the type in question, see *Evans—Purchase—Pocono Motor Freight Term., Inc.,* 97 M.C.C. 144 (Jan. 11, 1965), and *Long Transportation Co.—Purchase—La Grou,* 97 M.C.C. 631 (Aug. 30, 1965). In both cases the Commission, for the expressly stated purpose of eliminating future litigation, imposed the following restriction: "operations under the unified rights shall be restricted against the transportation of traffic having both origin and final destination at points in Pennsylvania".

rates subjective good faith, and other considerations. In *Rock Island Motor Transit Co.* v. *Watson-Wilson Transportation System, Inc.*, 99 M.C.C. 303 (served August 13, 1965) complaint was made by Iowa intrastate competitors of Watson-Wilson that the latter's use of terminals at Omaha, Nebraska and Rock Island, Illinois as consolidation points for less than truckload traffic transported between points in Iowa, without intrastate authority, constituted an "evasion to escape Iowa intrastate regulation." Aside from the happenstance of location of the terminals, which were built after interstate certification, there was no economic justification for an interstate, rather than intrastate, routing. The Examiner found that "[the] terminals [at Omaha and Rock Island] could just as easily be established at Council Bluffs and Davenport [Iowa] with resulting economies in operation if intrastate authority could be obtained from the Iowa Commission" (Recommended Report and Order, Docket No. MC-C-2972, served November 7, 1962 at page 12), and concluded that "the act of Watson in situating its terminal in an adjacent state does not convert a route otherwise characterized by circuity and backhauling into a normal and natural route" (at page 14), and that the operations constituted a "subterfuge". The Commission disagreed on the grounds that the majority of Iowa-to-Iowa shipments "move over fairly direct routes" (99 M.C.C. at 311); that much of such traffic moves over the same routes as multi-state traffic (Ibid); of the "small size" of Watson's all-Iowa, as compared multi-state, operations ("considerably less than 3 percent") (Id. at 312); that there was no evidence that the operations "begun more than a generation ago, were devised as a subterfuge", both the Iowa Commission and, presumably, Watson's competitors knowing

of operations and not challenging them "despite the opportunity presented to the Iowa Commission as a party opposing Watson's 'grandfather' application before the Interstate Commerce Commission to question the *bona fides* of the operations." (Ibid) The Commission concedes the unfairness of a strictly-applied economic justification test, in terms reflecting the policy basis behind the strict construction of Section 212(a) of the Act:

> ". . . There being no evidence to the contrary, we can only assume that the operation was apparently condoned by all concerned for many years and allowed to grow gradually to what it is at present. Since it does not appear that it was instituted as a subterfuge or fostered as one, we have considerable doubt that with such a background it could gradually grow to be one, regardless of how its efficiency at a particular moment years later would compare with the efficiency of direct operation. *In any event, bearing in mind that comparative efficiency is subject to considerable fluctuation with changes in such things as roads, equipment, methods, labor expense and other costs, competition, traffic volume, and other factors,*[3] it would seem that as long as the matter of comparative efficiency presents a reasonably close question, the issue of lawfulness should not be decided on the basis of comparative efficiency alone." (At p. 316)

> ". . . As suggested by [the applicable court decisions] the Commission and the courts, in most of

[3] The most significant lesson to be drawn from *Rock Island Motor, supra* is that the Commission has now compelled *itself* to consider external variables in construing certificates rather than considering the language of the certificate alone. That policy or doctrine if perpetuated and extended, contrary to statute and precedent, will require certificate holders to prove and reprove, again and again, public convenience and necessity. Such a result cannot be tolerated.

the cases involving an alleged subterfuge, will compare the efficiency of the direct and the circuitous routes. Such a comparison is not the sole test of good faith. *Service Storage & Transfer Co., Inc.* v. *Virginia, supra,* at page 176. However, it is usually the best indicator of the carrier's *intent* because without some compelling reason, a carrier would normally seek and use the most efficient routes available." (at p. 307)

C. The Commission Has Neither Express Nor Implied Power to Interpret Unambiguous Certificates Other Than Through Giving Effect to the Literal Terms Thereof

The government, obviously conceding that appellant's certificate literally authorizes the questioned operations, gratuitously (and rather surprisingly) asserts: "the Commission [is empowered] to look beyond the literal language of such certificate" (p. 4).

If the foregoing quotation is adopted by this Court as an acceptable canon of certificate construction, the prevailing interpretative rules (historically applied by the Commission and the courts) that (1) "operating rights must be construed according to their terms"[4] and that (2) limitations upon authorized operations in certificates must be specific and not left to be implied[5] can no longer obtain.

CONCLUSION

Almost seven years ago (Oct. 13, 1958) this Court granted certiorari in *Service Storage & Transfer, supra,* to determine whether the Commonwealth of Virginia could ignore the literal terms of a federal fran-

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[4] *C & E Trucking Corp.*, 88 M.C.C. 391, 393.

[5] *Atlantic Freight Lines, Inc.—Petition for Declaratory Order,* 51 M.C.C. 175, 188-9.

chise and prosecute the holder thereof for allegedly violating provisions of State law. It is assumed that certiorari was there granted also for the purpose of resolving with finality the continuing controversy with respect to the interstate-intrastate questions springing from the language of certificates issued by the Interstate Commerce Commission. It was there held, inter alia, that where "the certificate *on its face* covers the whole operation" the state was powerless to interfere with the operations of the federally franchised carrier.

One of the questions here is whether the Commission *itself* is bound by the literal terms of the certificate involved. In the government's motion to affirm, it is said the Commission may ignore the plain meaning of the language contained in the certificate. That contention must be rejected unless we are to confer on the Interstate Commerce Commission powers of revocation and modification expressly withheld in Section 212(a) of the Act as construed and applied by this Court in *U. S. v. Seatrain,* 329 U.S. 424.

This case, as well as a number of others,[6] makes manifest the fact that the law remains unsettled. Moreover, as evidenced by the Commission's recent decision in *Watson-Wilson, supra,* fair, consistent and uniform application of the vague standards of interpretation expressed in *Hudson Transportation Co.* v. *U. S.,* 219 F. Supp. 43, cannot be achieved by the Commission

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[6] See *Hudson Transport Co.* v. *U. S.*, 219 F. Supp. 43 (D. N.J., 1963) (in which similar operations by other carriers were involved); *Jones Motor Co., Inc.* v. *United States,* 218 F. Supp. 133 (D. Pa., 1963) (ditto); *Rock Island Motor Transit Co.* v. *Watson-Wilson Transportation System, Inc., supra; Evans—Purchase—Pocono Motor Freight Term., Inc. supra* n. 2; *Long Transportation Co.—Purchase—La Grau, supra* n. 2.

in proceedings involving certificate interpretation, and certificate holders will continue to be exposed to harassing litigation either before the Commission or the Courts. If the circumstances presented to this Court in *Service Storage & Transfer, supra,* justified the grant of certiorari, it appears clear that the present controversy justifies the noting of probable jurisdiction so as to permit plenary consideration of the important questions involved.

Respectfully submitted,

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